No. 2811

IN THE

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

M. A. ELLIS,

Appellant,

vs.

J. L. REED,

Appellee.

BRIEF OF APPELLEE

UPON APPEAL FROM THE DISTRICT COURT
FOR THE TERRITORY OF ALASKA,
THIRD DIVISION

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STATEMENT OF THE CASE.

This is an appeal from the District Court for the Territory of Alaska, Third Division. The proceeding which this court is called upon to review was an equitable action brought by the appellee against the appellant and Eri Thompson and J. M. Cummings. In the court below appellee was adjudged to have a valid lien by virtue of the levy of attachments in Causes S. 20 and S. 21 upon a certain placer mining claim known as the Battle Axe, located on Thunder Creek, in the Cook Inlet Mining and Recording Precinct,

Territory of Alaska; that said lien commences and dates from the 22nd day of September, 1912; that the purported conveyance dated the 25th day of October, 1909, executed by Eri Thompson to J. M. Cummings was made with intent to hinder, delay and defraud the creditors of said Thompson of whom appellee is one, and to it set aside so far as the same conflicts with plaintiff's lien and rights and is inferior thereto; that the conveyance dated the 28th day of February, 1913, between J. M. Cummings and M. A. Ellis was accepted by the grantee with notice and knowledge of the fraud affecting its validity and with notice and knowledge of plaintiff's liens and equities by virtue of his judgments, attachments and levy of attachments in said causes, and that plaintiff proceed to the sale of said property under execution.

In cause S. 20, entitled Wm. C. Snook vs. Eri Thompson and Dave Wallace, co-partners, plaintiff recovered judgment for the sum of $582.68 for work and labor performed as a placer miner on the Battle Axe mining claim in the year 1907. Said judgment was subsequently assigned to appellee J. L. Reed.

In cause S. 21, entitled J. L. Reed vs. Eri Thompson and Dave Wallace, co-partners, plaintiff recovered judgment for the sum of $822.30 for work and labor performed by plaintiff's assignor Karl Karlson as a placer miner on the Battle Axe mining claim in the years 1906 and 1907.

In both causes writs of attachment were issued and on the 22nd day of September, 1912, levies were made upon defendant's interest in said Battle Axe

mining claim and the return of service filed in the clerk's office of the district court on December 3rd, 1912, and thereafter the certificates of levy were filed in the office of the recorder of the precinct in which said claim is situated, on the 25th day of July, 1914.

On December 7, 1911, said defendant Cummings granted an option to purchase said Battle Axe mining claim to one Al Harper for the sum of $10,000 to be paid as follows: the sum of $4,000 on or before January 15th, 1912; the sum of $3,000 on or before July 15th, 1912, and the further sum of $3,000, on or before September 1st, 1912. On December 19th, 1911, said Al Harper assigned all his interest in and to said option to M. A. Ellis. The first payment made by Ellis was in February, 1912, of the sum of $4,000. The second payment of $3,000 was made in August, 1912. The final payment of $3,000 was made in February, 1913, and on the 28th day of February, 1913, Cummings executed a deed to Ellis for said Battle Axe mining claim. The receipt showing the first payment of $4,000 reciting the option contract and its assignment to Ellis was duly filed for record in the recorder's office on the 11th day of March, 1912.

On the issue of appellant's knowledge of the attachment levies upon the ground sought to be charged by this suit with the lien of appellee's judgments appellant testified that in the summer of 1912, before the levies and many months before delivery of the conveyance from Cummings to appellant, he received a letter from Snook, a claimant, who later recovered judgment in one of the attachment actions, which

contention is correct, under the authority of Dalton vs. Hazelet, 182 Fed. 561-570. "The absence of a proper bill of exceptions leaves the case open for consideration upon the pleadings, findings of fact, conclusions of law, and decree."

Taking up the assignments of error in order counsel for appellee urge that none of them assigns reversible error even on appellant's view of the case except the averments of error in the findings of fact.

The first assignment of error challenges the order of the court overruling the demurrer of the defendant Ellis to Plaintiff's (appellee's) amended complaint.

Plaintiff pleads that appellant's predecessors in interest, or pretended interest, Thompson and Cummings, arranged a transfer of the property involved from Thompson to Cummings to defraud creditors; that the transfer in question had been declared void for fraud by the district court of Alaska and by this court; that appellant had full knowledge of said fraud and of the litigation; also that he had actual knowledge of appellee's lien on the property by virtue of the attachment levies before he received his deed for the property. These allegations appear to counsel for appellee to state a complete cause of action so explicitly that argument against the demurrer is superfluous.

Appellant's motion for a new trial in the district court, denial of which forms the basis of the eighth assignment of error, if it has any virtue, also appears

to be subject to the fatal objection that it was not filed in time. The decision of the court was filed November 18, 1915. The judgment was filed December 1, 1915; the motion for new trial was filed December 20, 1915. The Alaska code requires a motion for a new trial in a civil case to be filed three days "after the verdict or other decision." When a decision is given in vacation by the court twenty days are allowed for filing a new trial but this decision was given in term time.

Appellant's brief misstates facts when it says (p. 4), "These judgments were rendered, in fact the suits were started long after Ellis had purchased the land, and was in possession of the same and working it."

The real fact is that the actions were started (August, 1912) after Ellis had taken an assignment of an option to purchase given to Harper, but long before final payment of the purchase price was made. The final payment of $3000 was made and deed delivered February 28, 1913, five months after the levies of attachment upon the land.

Appellant's assertion on page 10 of his brief that the judgments against Thompson and Wallace are invalid even as judgments in rem because the certificates of levy were not filed within ten days wholly misconceives the Alaska law of attachment. The levy is complete when made on the ground as required by law. The certificate is only to give notice to third persons.

The contention of appellant's brief that he is not bound by the attachment is founded entirely upon his construction of the meaning of that part of Section 972, Compiled Laws of Alaska, which reads "When such certificate is so filed for record the lien in favor of the plaintiff shall attach to the real property described in the certificate from the date of the attachment, but if filed afterwards, it shall only attach, as against *third persons*, from the date of such subsequent filing." Clearly within the contemplation of this statute such *third persons* would not include the defendants, Thompson, Wallace and Cummings, and we contend that it does not include Ellis unless he is a purchaser in good faith and for a valuable consideration without notice of plaintiff's equities.

The statute merely provides a *method of giving notice* of the attachment lien and a compliance therewith is no part of the levy.

Deveney et al. vs. Burton, 35 S. E. 268.

In Trevis et al. vs. Topeka Supply Company, 22 Pac. 991, it was held that an attachment levy on real estate is *constructive notice only* to such persons as may acquire subsequent interests in the attached realty from *parties or privies* to the action.

Applying this rule to the present case the levy of attachment on the 22nd day of September, 1912, was constructive notice to Thompson and Wallace and Cummings and both *actual and constructive notice to Ellis* under the facts and circumstances which developed prior to the consummation of his purchase

on the 28th of February, 1913.

The jurisdiction of the trial court is fully upheld by the authority of Bank of Colfax vs. Richardson, 34 Or. 518.

As to appellant's second, third, fourth, fifth, sixth and seventh assignments of errors we believe that the theory upon which these assignments are predicated is the same in each instance and relates to the findings, conclusions and judgment of the trial court holding that Ellis had actual notice and knowledge of appellee's liens, equities and rights under and by virtue of his levies of attachments in Causes S. 20 and S. 21 made on the 22nd day of September, 1912, thereby making Ellis' title derived from J. M. Cummings under deed dated the 28th day of February, 1913, recorded on the 28th day of March, 1913, subject and inferior thereto.

Going back of the grounds set forth in his assignments of error appellant's theory of this case at the trial and upon this appeal is based upon his claim of superior equities under deed dated February 28, 1913, and recorded March 28, 1913, to the rights and equities of appellee by virtue of his levies of attachment on September 22nd, 1912, because the deed to Ellis was recorded prior to the recording by appellee of his certificates of levy of attachments. In setting forth this contention appellant avoids the doctrine of actual notice and rejects all facts which taken either separately or collectively would be sufficient even to put him upon inquiry as to appellee's rights and equities. The learned trial judge found against appellant's

contention as to actual notice (R. 63) and in his opinion after reviewing the testimony concludes (R. 70),

> "I believe the knowledge which Ellis is shown by his own testimony to have had is such as to bring him within the first named class, that of 'express knowledge or notice.''

Compiled Laws of Alaska, Sec. 973, provides:

> "From the date of the attachment until it be discharged or the writ executed, the plaintiff as against third persons shall be deemed a purchaser in good faith and for a valuable consideration of the property, real or personal, attached, subject to the conditions prescribed in the next section as to real property," etc.

Compiled Laws of Alaska, Sec. 974, provides,

> "If real property be attached, the marshal shall make a certificate containing the title of the cause, the names of the parties, a description of such real property, and a statement that the same has been attached at the action of the plaintiff, and the date thereof. Within ten days from the date of the attachment, the marshal shall deliver such certificate to the commissioner as ex-officio recorder of the recording district in which such real property is situated, who shall file the same in his office and record it in a book to be kept for that purpose. When such certificate is so filed for record the lien in favor of the plaintiff shall attach to the real property described in the certificate from the date of the attachment, but if filed afterwards it shall only attach, as against third persons, from the date of such subsequent filing" etc.

Under Section 973, which is the same as Section 302 B. & C. Comp. of the laws of Oregon and the con-

struction placed thereon by the supreme court of that state appellee's rights under his levies are the same as though he had purchased the Battle Axe mining claim and had not recorded his deed and thereafter Ellis with notice and knowledge of the purchase had also purchased the same mining claim and by reason of being the first to place his deed of record asserted title and superior equities to the former.

In Boehringer vs. Creighton, 10 Or. 42, the court says,

> "Counsel for respondents suggested at the hearing, that the effect of the terms of this statute places the attaching creditor in as good a position as that of a bona fide purchaser for a valuable consideration, notwithstanding his notice of previous unregistered deeds or other instruments. But we do not think any such construction can be tolerated. It would encourage fraud and uphold injustice, instead of enforcing a rule of right and fair dealing among men. The statute was evidently designed to place him *upon an equal footing*, but not to confer upon him a superior advantage, by protecting him in the enjoyment of the fruits of fraud. The wording of the statute does not demand such a construction, and we can discover no reason or analogy to support it."

If an attaching creditor stands on an equal footing with and is deemed a purchaser in good faith and for a valuable consideration as to third persons, the same reasons and arguments apply to a subsequent purchaser with notice of a previous unrecorded certificate of levy of attachment, i. e. "it would encour-

age fraud and uphold injustice, instead of enforcing a rule of right and fair dealing among men."

The same doctrine is reaffirmed in Dimmick vs. Rosenfeld, 34 Or. 101, in which Justice Bean says,

> "It is claimed, however, that by virtue of Section 150 of the statute (Hill's Ann. Laws) which is made applicable to levies under execution by Section 283, the defendants' levy entitles them to the protection accorded to bona fide purchasers for value. But these sections of the statute were simply designed to place an attaching or execution creditor *upon exactly the same footing* as purchasers from a judgment debtor, and not to confer upon them any superior advantages: citing *Rhodes vs. McGarry*, 19 Or. 222, *Meier vs. Hess*, 23 Or. 599; and also affirmed in *Security Trust Company vs. Loewenberg*, 38 Or. 159.
>
> The doctrine finds its basis and is stated in Pomeroy's Equity Jurisprudence, Vol 1 (3rd Ed.), Sec. 430 in the operation of equity upon the conscience of a party, the latter part of this section reads, "Courts of equity have but added the rule that if the subsequent party, who thus obtains the legal benefit of a record, has notice, his recorded instrument shall be subordinate to the prior unrecorded conveyance of which he was charged with notice. In giving this effect to a notice, the courts of equity do not assume to nullify the provisions of the recording act; they admit that a subsequent grantee has, by means of his recod, obtained the complete legal title, which cannot be directly set aside nor disturbed; but they say that the notice of the prior conveyance makes it unconscientious for him to hold

and enjoy that legal title for his own benefit, and they impose upon his conscience the obligation of holding it for the benefit of the prior unrecorded grantee."

In State of Oregon vs. Cornelius, 5 Or. 46, the court by Prim J. says, "The only effect of such a levy was to create a lien upon the real property in favor of the party suing out the attachment, from the time of the levy."

In 4 Cyc. 638, the rule is stated as follows:

"The phraseology of some statutes regarding the registration of titles to real estate places an attaching creditor on a par with a purchaser, and in those states a creditor levying an attachment without notice of a prior unrecorded deed is entitled to priority over the grantee under the unrecorded deed; but unless aided by statute the general rule will prevail, and the creditor will be postponed to the unrecorded conveyance." Citing Oregon cases heretofore referred to.

In the case of Raymond vs. Flavel, 27 Or. 219, p. 247, the court says:

"It is asserted that 'upon proof of the equitable title of plaintiff, a defendant who relies upon the defense of being an innocent purchaser in good faith must set up the *union of the legal title with a superior equity* arising from the payment of the money and receiving the conveyance without notice, and with a clear conscience.' This doctrine seems to be based upon good authority."

As to the questions of the bona fides, notice and knowledge on the part of Ellis at the time of the ac-

ceptance by him of the deed from Cummings on the 28th day of February, 1913, of appellee's rights and equities by virtue of his levies of attachment on the 22nd day of September, 1912,

In Coolidge vs. McClaine, 11 Or. 327, the court Waldo J. says,

> "These cases hold that, in such case, constructive notice is not sufficient; that actual notice is necessary to make the grantee a party to the fraud. Actual notice need not be established by direct proof. The fact of notice, or knowledge, may be inferred from circumstances. Under this view of the law, the question to be determined is, did the grantee, in fact, know or believe that the grantor intended to defraud his creditors? On the sound principle and particularly on the wording of the statute, the doctrine of these cases out to be followed."

In Osgood vs. Osgood, 35 Or. 1, on p. 16 the court says,

> "The knowledge of Neustadter Bros.' touching the plaintiff's equities in the lots makes them guilty of bad faith in the attachments there." Cases cited. "We said in Raymond vs. Flavel, 27 Or. 219, 'If a person has actual knowledge of latent equities and purchases notwithstanding, the presumption of *mala fides* is irresistible, or rather, he takes the estate laden with the equities. and stands in no better position than his grantor. The attempt to claim as an innocent purchaser is the fraud of which the equitable owner may complain.'"

In Jennings vs. Lentz, 50 Or. 483, it was held, *syllabi,* of case,

1. That an attaching creditor, in order to obtain the rights of a bona fide purchaser, is bound to prove that he in fact acquired his lien in good faith and without notice of outstanding equities.

2. Good faith is an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all belief of facts which would render the transaction unconscientious. A want of that caution and diligence which an honest man of ordinary prudence, is accustomed to exercise in making purchases is, in judgment of law, a want of good faith.

3. Whatever is sufficient to put a subsequent purchaser on inquiry must be considered legal notice to him of the facts inquiry would have disclosed by the exercise of reasonable diligence."

We think that the doctrine of the case of Haines vs. Connell, 48 Or. 472, is conclusive of the law of this case, and if Ellis had notice and knowledge of appellee's equities his rights are secondary thereto. The question involved there was, whether an attaching creditor had notice of the equities of a grantee under a prior unrecorded deed at the time of his levy of attachment. The court below was reversed for the reason that there was no evidence given at the trial by either party concerning a knowledge or want of knowledge of plaintiff's interest in the property by the attaching creditor at the time of the attachment. The principle involved is identical with the case be-

fore the court. The court says,

> "The deed from Kane to the plaintiff had not been recorded at the time of the levy of the attachment issued in the action of Schoch vs. Kane, and more than five days has elapsed since the date of its execution, and, therefore, the attachment, if valid, will take precedence over such deed if such attachment was made in good faith and without notice of plaintiff's rights." Cases cited.

In the case of Thompson vs. Reed, 202 Fed. 870, wherein other creditors of Thompson brought an action in equity to set aside the deed from Thomas to Cummings dated the 25th day of October, 1909, upon the ground of fraud, being the same deed through which Ellis is now asserting title, this court on the 3rd day of February, 1913, sustained the trial court and held; in the following language,

> "The deed from Thompson to Cummings being void for fraud, Reed's judgment became a lien upon the real property described in the deed upon the recording of the judgment in the office of the recorder of the district in which the property is situate, by virtue of the statute of Alaska (Section 260, Pt. 4, Carter's Codes), which reads as follows; etc."

The claims of the creditors of Thompson now before the court were contemporaneous with and of a similar character to those litigated in cause reported 202 Fed. 870, being for labor and work performed on the Battle Axe mining claim in 1906 and 1907.

The assignments of error seek a reversal of the court below upon the determination of a question of

fact respecting which subject this court in Tobey vs. Kilbourne, 222 Fed. 760 held,

> "It is the established rule that the findings of the trial court in a suit in equity must be taken as presumptively correct, and that unless an obvious error has intervened in the operation of the law, or some serious or important mistake has been made in the consideration of the evidence the findings will not be disturbed by the appellate court."

Regarding some of the facts offered in evidence at the trial which the court below deemed sufficient to charge Ellis with notice and knowledge of appellee's rights and equities the court's attention is directed to the following:

The same attorney, S. O. Morford, who acted throughout for either Thompson or Cummings at the trial and appeal of cause entitled Thompson vs. Reed, 202 Fed. 870, represented Ellis at the trial of this cause and testified in his behalf.

Karl Karlson one of the claimants filed a lien on the mining ground in question April 29, 1907, but did not bring suit within six months thereafter (R. 34). July 14, 1912, Wm. C. Snook wrote Ellis of his claim. August 10th Ellis answered Snook's letter and advised him to sue and get judgment (R. 30 and 31). In August, 1912, both Snook and Carlson commenced separate actions against Thompson and Wallace, copartners, and on September 22, 1912, caused levies of attachment to be made on the Battle Axe mining claim (R. 28, 29). On December 19, 1911, Ellis took an assignment from Al Harper of the latter's option

to purchase the Battle Axe mining claim (R. 42, 43 and 44), and made his first payment of $4000 in February, 1912, at which time he knew of the pendency of the cause of Thompson vs. Reed on appeal (R. 144).

Q. When did you make your second payment?

A. I made the second payment, I think it was the second of August—it was before I came out; I sent out gold dust; made it at the Bank of Seward (R. 114 and 115).

Q. At the time of the final payment did you receive a deed to the property?

A. Yes, sir.

Q. Was it at that time you made the payment?

A. Yes sir (R. 116).

Q. At what time?

A. I think it was in February, 1913, I ain't certain about that date.

Ellis was in possession of the mining claim in 1912 and left for Seward, September third, 1912 (R. 122 and 123).

"Q. You knew that some kind of a paper had been posted on the cache in 1912?

A. Yes sir.

Q. About what month was that?

A. That was in October.

Q. Did you take any steps to ascertain what that paper was?

A. Yes sir.

Q. What did you find that paper to be?

A. They told me that it was a suit started by Snook against Wallace and Thompson."

Ellis states under oath that he had no knowledge

that an attachment had been levied on the Battle Axe claim when he came to Seward in October, 1912. Let us examine the probabilities of that statement being true.

> "A. Absolutely nothing. I came to Judge Morford and asked him if he knew about it, and had him *call up the office at Valdez*, while I was here, the two or three days I was waiting for the boat and he couldn't find out anything for me, what the papers were at all and I didn't know until I heard from up there that it was a suit started against Thompson and Wallace." (R. 124).

Calling up the office at Valdez from Seward has reference to the subject of Exhibit (R. 62) Letter October 8, 1912, Lakin to Morford.

> "In compliance with your *telegram* of this date, I enclose herewith a certified copy of the complaint in cause S. 20.
>
> As there has been no return of the *Writ of Attachment*, I am unable to send certified copy of that or the return."

Defendant's Exhibit 4, Morford acknowledges receipt of the copy of the complaint in Snook vs. Thompson suit, and adds, "As soon as you receive return of attachment, please send me a copy of the writ and the return, *as I am informed an attachment has been placed upon the property at Susitna.*" (R. 61).

This letter Morford identifies is his redirect examination on (R. 148 and 149).

Can knowledge be more direct and complete than this? Ellis had Morford call up the clerk's office at Valdez and in compliance therewith Morford requests

a copy of the complaint and states that he had been informed that an attachment had issued, at the time Ellis was in Seward with knowledge of a suit commenced by Snok and that some paper had been posted upon the Battle Axe mining claim.

S. O. Morford testified (R. 142).

"Q. The question was did you and Mr. Ellis talk about these Snook and Carlson claims when he came out in the fall of 1912?

A. I think it was mentioned, yes.

Q. Did he tell you that Arthur Meloche had told him about the notice being posted on the cache house?

A. It is hard to remember exactly but I almost feel as if Meloche and Ellis were both at my office.

Q. And you talked it over?

A. Yes sir."

The opinion of the trial court states the facts regarding appellant's knowledge of the fraudulent character of the deed to Cummings as follows:

"His own testimony clearly shows that he knew of the action pending to declare said deed from Thompson to Cummings void; that he paid over a considerable portion of the purchase price owing to Cummings to a trustee, to be held pending the final determination of said action, and that when said action was finally determined adversely to Cummings, said money was paid to the plaintiff Reed in satisfaction of the former judgment" (R. 66).

Further on the same page the court in its opinion summarizes the admissions of appellant of correspondence with Snook, one of the claimants whose

claim forms part of the basis of this suit, regarding that claim. The testimony to which the court refers is found on pages 114-5-6 of the record.

The law of notice so far as it affects the issue in this case seems to plaintiff to be clearly defined and settled. The following statement seems to be all-inclusive of the issue here:

> "Notice, in its legal sense may be defined as information concerning a fact actually communicated to a party by an authorized person, or actually derived by him, which information is regarded as equivalent in its legal effects to full knowledge of the fact, and to which the law attributes the same consequences as would be imputed to knowledge.
>
> "It is a general rule that whatever puts a party on inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty, and would lead to a knowledge of the facts by the exercise of ordinary intelligence and understanding." 29 Cyc. 1113-4-5.

Cases laying down the rule just quoted are so numerous that they can be gathered at random, all stating the principle in similar language, such as the following:

> "One is bound by actual knowledge, or actual notice of such facts and circumstances as by the exercise of due diligence would lead to knowledge of another's title to land; or where his ignorance is the result of gross and culpable negligence he is equally bound." Simmons Creek Coal Co. vs. Doran, 142 U. S. 417.
>
> "Where one is put on warning, and makes no inquiry, he is charged constructively with

knowledge of those facts which a reasonable investigation would have disclosed to him." Parker vs. Parker, 56 Atl. 1094 (New Jersey).

"Where one has knowledge of facts sufficient to excite the attention of a person of ordinary prudence and put him upon further inquiry, he is required to make such inquiry with good faith and with diligence; and, in the absence of so doing, he will still be chargeable with knowledge of the particular point or fact which such inquiry would have revealed." Webb vs. John Hancock Mut. Life Ins. Co., 69 N. E. 1006 (Indiana).

In the opinion of the trial court, which appears on pp. 63-70 inclusive of the record, ample authority is cited, not necessary to repeat here, to the same effect as the foregoing. The court found that the facts of this case clearly charged appellant Ellis with such actual knowledge as fastened upon him imputed knowledge of the pending actions and attachments with all the legal responsibility such knowledge entailed, as well as of the previous litigation which secured from this court, affirming the district court of Alaska, a decision holding the deed from Thompson to Cummings to have been fraudulent and void as to creditors. The opinion says:

"It would thus seem that Ellis, while not chargeable with the constructive notice provided for in Section 974, that is, by the filing of the certificates of the attachment in the recorder's office, had actual knowledge of the whole affair—of the attack on the deed from Thomas to Cummings; the suit then pending on appeal; the fact that

Snook had a claim for wages against Thompson for work on said ground in 1907, for which he himself had advised Snook to bring suit and get judgment; and such notice of posting on the ground, in view of all the circumstances in this case, was not only sufficient to put him on inquiry, but brought home to him actual notice of plaintiff's rights" (R. 67-68).

This summary appears to counsel for appellee to state the vital facts of the case and to justify the judgment.

The ninth assignment of error is that the court erred in overruling defendant Ellis' objection to the allowance of attorney's trial fee of twenty dollars.

Compiled Laws of Alaska, Sec. 1341, provides:

> "The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums by way of indemnity for his attorney fees in maintaining the action of defense thereto, which allowances are termed costs."

Counsel for appellee respectfully submit that the record discloses no reversible error and that the judgment of the district court of Alaska should be affirmed.

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